Supreme Court, U.S.
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Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS

Vs.

THE CITY OF KEY WEST - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARNAUD GIRARD
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER a deliberate refusal by a city final policymaker to grant a review of acts of a subordinate requested by an aggrieved party allows city to claim lack of liability on the ground that such policymaker didn't review the issue?

II. WHETHER a delegation of final policymaker authority can be the source of municipal liability absent statutory legal support?

III. WHETHER a final policymaker who deliberately refuses to review a complaint concerning a subordinate's decision should be deemed to have adopted the decision and motive for it for purposes of municipal liability?

IV. WHETHER, when a plaintiff makes a showing of refusal to review by a final policymaker, a Defendant city should have to demonstrate that the laws of the city framed a clear, reasonable, and compellable appeal process?

V. WHETHER 'custom and practice' requires proof of actual knowledge of the wide-spread practice before municipal liability can attach?

VI. WHETHER final policymakers knowledge can be inferred from the proof of wide-spread practice?

VII. WHETHER Plaintiffs' complaint had established a genuine issue of fact as to the existence of the City's unconstitutional custom and policies at work in the retaliatory actions against them?

VII. WHETHER the District Court when moving sua sponte on Summary Judgment should have notified Plaintiffs to file all of their evidence?

LIST OF PARTIES

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JURISDICTION

The date on which the Untied States Court of Appeals decided this case was October 25, 2001.

A timely petition for rehearing was denied by the United States Court of Appeals on July 15, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

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STATEMENT OF THE CASE

Petitioners sued the City of Key West under 42 U.S.C. § 1983 for Equal Protection clause and First Amendment/Free Speech violations resulting from retaliatory conduct on the part of city officials after Petitioners organized a tenants association opposing the City's development plans for a City-owned marina (Key West Bight Marina) and publicly charged officials with fraudulent management in violation of federal regulations.

Prior to suing the City, Plaintiffs had made a written request for hearing to the City Manager and the Key West Bight Management District Board (City appointed board overseeing the marina) seeking review of the Bight Manager's various adverse decisions. Such requests for administrative review were denied.

The City Attorney informed Plaintiffs that the Bight Manager's adverse decisions were final and were the "City's position".

Plaintiffs filed this lawsuit alleging that City officials in a final policymaking position had violated their constitutional rights through eviction, arrest without probable cause and various unlawful seizures of property.

Since the retaliation intensified as a result of filing suit, Plaintiffs amended their complaint to add more police retaliation and evictions and charged that the City Commission repeatedly affirmed a policy of "not doing business with people who are suing the City" and that the Commission had granted overbroad and unbridled discretion to the Bight Manager in allowing him the right to "refuse to offer dockage to anyone for any reason" and that such policies supported the retaliatory animus.

Plaintiffs also charged that given the number of incidents of constitutional deprivations (greater than 10) and the number of people (four) claiming similar discriminatory

treatment, the City had a custom of retaliation against First Amendment activists at City-owned marinas.

The Defendant moved for Summary Judgement on the basis that the Bight Manager was not the final policymaker but was under the supervision of the City Manager. The District Court agreed with that interpretation. The Court, acting sua sponte, also rejected Plaintiffs' custom and policy arguments on the grounds that although there may have been a custom of retaliation against free speech as evidenced by repeated incidents, Plaintiffs furnished no evidence that the final policymakers had knowledge of the custom.

The U.S. Court of Appeals for the Eleventh Circuit upheld the District Court's judgment..

REASONS FOR GRANTING CERTIORARI

A] FINAL POLICYMAKER DEFENSE

Applying Monell v. Department of Social Services, 98 S.Ct. 2018 (1978), the U.S. Court of Appeals for the Eleventh Circuit upheld the summary judgment dismissal of this case stating that the City was not liable for the acts of the Bight Manager (city-owned marina manager) since he was not a City final policymaker but was under the supervision of the City Manager as a matter of law.

However, the evidence shows that Plaintiffs had expressly requested review of adverse decisions taken by the Bight Manager, by certified mail sent directly to the City Manager, who declined to review Plaintiffs' grievances.

It would seem that the City has escaped liability by deliberately obstructing its own appeal process.

Commentaries as well as the dissenting opinions in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) have predicted that City policymakers might now have an incentive to muddy their administrative appeal process and to decline to use their plenary oversight authority so as to avoid liability for the City.

Monell and its progeny recognize delegation of final policymaking authority as a bonafide source of municipal liability but, at the same time, the Court requires:

> In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.
> Praprotnik,, 485 U.S. 112, 126

In many instances like in this case, however, the delegation will not leave any statutory imprint so as to identify the new policymaker under an inquiry based solely on the law.

This has left a serious loophole in matters of municipal liability. A municipality may simply delegate its most questionable activities (especially in the new trend of municipalities as business entities) to lower level employees without leaving a trace of a statutory transfer of policymaking authority and so long as the statutory policymaker makes sure not to review any controversial issues, the municipality will have insured everlasting immunity.

In the case at bar:

The City in a takeover of the harbor (Key West Bight) creates a Community Redevelopment Agency, funded with municipal bonds, having its own unique budget and administration headed by the Bight Manager and the Key West Bight Board. The gentrification plan creates immediate friction between the Bight Manager and Plaintiffs who complain of various acts of retaliation against their political stance (tenants association).

However, the request for hearing sent to the City Manager as well as the Key West Bight Board are never answered. Plaintiffs complaints are, rather, redirected to the Bight Manager who makes such policy statements as to who is or is not entitled to be heard by the Key West Bight Board.

Regarding the Bight Manager's denial of dock space, Plaintiffs make a request for the City's final order which is forwarded to the City Attorney. The City Attorney formalizes the Bight Manager's decision defining it as "the position of the City of Key West," and does not notify Plaintiffs of any available appeal process, as is required by law if such a process exists.

The Bight Board repeatedly refuses to hear Plaintiffs and when a hearing is compelled after Plaintiffs petition the County Court to obtain this administrative remedy, the Bight Board declares that they "do not wish to undermine what the manager is trying to do (specifically evict Plaintiffs).

A few years later the City Commission decides to bring the office of the Bight Manager into the City administration, expressly stating that he will now be under the supervision of the City Manager.

However this means the entire time previous to the 1996 amendment, every policymaker in the City, including the City Commission, had agreed to a broad delegation of absolute final policymaking authority in favor of the Bight Manager.

However, once the City gets sued for acts of the Bight Manager (acts occurring while the 1993 ordinance was in effect), the City invokes the Monell defense compelling the Court to rule that the Bight Manager was under the statutory supervision of the City Manager according to a very vague City Charter provision and that therefore the City may not be held liable.

This Court in Praprotnik noted:

> If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, 1983 could not serve its intended purpose.
> Praprotnik, 485 U.S. 112, 126

Monell was set on an assumption that cities will fairly guide their aggrieved citizens through the appeal process, not the contrary. However, the contrary is just what cities will be more and more tempted to do as they swing more towards unregulated private business domains with enormous projects and pressures such as twenty million dollar high interest

mortgages as in the case at bar. City officials' patience could predictably run out under the pressure pushing them to engage their governmental powers in conduct resembling that of private corporations towards those citizens who would stand between them and their stringent financial goals and obligations; and of course cities would attempt to avoid constitutional liability that their private competitors do not face.

The Court should close the loophole and find that a final policymaker who deliberately refuses to review a complaint directed toward him about a subordinate employee is deemed to have agreed with subordinate's decision and the motives for it since he had an opportunity to redress the wrong and refused to, thereby giving rise to municipal liability.

Furthermore, the Court should enlarge the policymaker inquiry to include review of the supervisory appeal process.

Quite simply, if the City had an appeal process associated with every administrative order which required notice of how and when the order is reviewable any aggrieved party could simply follow the track or petition the County Court for writ of mandamus. If a defendant cannot show that its laws had made available to Plaintiff a clear, reasonable, and compelling appeal process, the simple fact that the law describes a 'supervisor' who had refused to use his reviewing power should not be in and of itself enough to invoke the Monel defense. Such is the situation in the case at bar.

B] CUSTOM AND PRACTICE

This Court has recognized that a city can be held liable for its customs and practices. Plaintiffs have supported their allegation of City's wide-spread practice of retaliation against First Amendment rights at City marinas by presenting 10 separate incidents of retaliation linked to their exercise of protected speech and have filed three affidavits of people who also claim they were evicted from the docks in retaliation for their public criticism of City management of the harbor.

Most federal circuits , applying Oklahoma City v. Tuttle, 471 U.S. 808 (1985), use the "more than one isolated incident" standard . However, the issue of level of municipal involvement in the custom required for purposes of attaching liability has become very devisive:

In the case at bar, the District Court ruled that Plaintiffs offered no proof of City's knowledge of the custom and that proof of complaints of the same nature to the city's policymakers didn't show that those policymakers were aware that the practice was indeed "wide-spread". The Eleventh Circuit affirmed.

The Fourth Circuit, requires proof not only of knowledge but also that the city condoned the practice. See Spell v. McDaniel, 824 F.2d 1380 at 1391(4th Cir).

However, in the Tenth Circuit and Eighth Circuit liability attaches when a wide-spread practice is shown and that the city policymakers when notified of a case regarding that particular unconstitutional conduct showed "deliberate indifference" or tacitly authorized the conduct. See McGartha v. Jackson County, 36 F.3d 53 at 56 (8th Cir. 1994) or Gates v. Unified School District , 996 F.2d 1035 (10th Cir. 1993). This is quite different from the Eleventh Circuit which requires proof of knowledge that a wide-spread practice exists.

For the Ninth Circuit knowledge is inferred from the wide-spread practice:

> [I]t is open to the city to show that the custom was not known to the policymakers of the Department, but the absence of formal reports of Blair's harassment is only an element of evidence as to their knowledge; it is not dispositive.

Blair v. City of Pomona, 223 F.2d 1074 (9th Cir)

Finally, even within the same case, in the case at bar, the first presiding District Court judge (honorable Judge James C. Paine) ruled twice against Defendants Motions to Dismiss and Summary Judgement finding that Plaintiffs had brought forth a viable custom and practice claim which, when drawing all inferences in their favor, could be adduced to be a custom and practice which the City's final policymakers had authorized.

The next presiding judge, however, (honorable Judge K. Michael Moore) ruled that Plaintiffs had failed to prove that the City policymakers knew that a wide-spread custom existed and dismissed the complaint.

There is obviously a quest for the correct standard to determine city liability within the custom and practice doctrine.

Plaintiffs argue that the Eleventh Circuit's requirement of actual knowledge of the final policymaker of the existence of a wide-spread practice is improper and that once the custom is in evidence, the proper standard requires rather a showing of approval or deliberate indifference to conduct similar to the one furthered by the unconstitutional custom.

The knowledge requirement brings the remedy too close to having the same burden of proof as in a case regarding a 'single isolated incident'. It defies the entire purpose of the doctrine of 'custom and practice' which is

meant to deal with "the most egregious intent by municipalities to shield themselves from liability" (Praprotnick, supra). In other words, a context of bad-faith and hidden intentions.

The issue of knowledge of the existence of the custom is really not dispositive. Knowledge would not always mean approval and approval of unconstitutional conduct similar to the one championed by the custom should not require knowledge that the conduct is wide-spread.

However, if a Plaintiff makes a showing that 1) the complained of conduct is widespread and 2) the city policymakers have tolerated or have been deliberately indifferent to action similar to the one supported by the custom then it could be fairly said that the custom has reached all the way to the top of the municipal hierarchy where municipal liability can attach.

The Ninth Circuit utilizes similar reasoning:

> Plaintiffs may prove the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded.
>
> Gillett v. Delmore, 979 F.2d 1341,1348 (9th Cir. 1992)
>
> Once such a showing is made a municipality may be liable for its custom irrespective of whether official policymakers had actual knowledge of the practice at issue.
>
> Thompson v. City of Los Angeles, 885 F.2d at 1444 (9th Cir.)

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Under these standards the District Court should have inferred the existence of a city custom based on the large number of incidents (10 for Plaintiffs alone plus three other people with similar claims of retaliation) and the fact that the final policymakers were notified but refused to redress the wrongs or make any effort to abate the practice.

Furthermore, city approval of the custom should be analyzed in relation with city officials' known policies which have a similar unconstitutional goal.

Those policies and the City's liability in relation to them are addressed in the final part of this petition. They consist of repeated official declarations by the City Commission and unanimous enforcement of an unconstitutional policy "not to do business with people suing the City". And a written policy of granting unbridled discretion to the Bight Manager to deny dockage "to any one for any reason."

Those policies together with the City's failure to take any action to abate the numerous claims of misconduct could convince a jury that city policymakers were in fact satisfied with the practice of uprooting one by one all those who actively opposed the City's gentrification plans at the marina, even if the City had no actual knowledge of how "wide-spread" the practice was.

C] POLICIES

The District Court ruled that allegations of an official unconstitutional policy "not to do business with people suing the city" didn't give rise to municipal liability because there was no proof that the final policymakers knew that their policy was being enforced. This may be the jurisprudence of the Eleventh Circuit but Plaintiffs argue that this reasoning is in error where the District Court should have applied a presumption that the policy was being enforced.

Once a policy is officially stated, it takes a life of its own and the city should be held liable for the actions its policy has compelled whether or not the city policymakers are aware of specific incidents of its implementation. Employees will try to apply the policy and indeed city officials refused to renew leases and dockage agreements with Plaintiffs after they sued the City.

D] MOVING FORCE

The District Court also ruled that there was no proof that the custom or policies were the 'moving force' behind the constitutional deprivations.

Plaintiffs argue that under a well-settled jurisprudence when First Amendment rights are evoked, proof of causal link requires only a showing that the alleged retaliatory conduct and the protected activity are not wholly unrelated. The burden then shifts to the Defendant to show that he would have taken the same course of conduct absent the expression of the protected speech.

Plaintiffs opposition to Defendant's Summary Judgement Motion clearly established 'the causal link' and no rebuttal was offered by Defendant.

E] *SUA SPONTE* SUMMARY JUDGMENT

Finally, a large part of the difficulty in the present Summary Judgment ruling on Plaintiffs' claim of policy and 'custom and practice' comes from the fact that the District Court acted sua sponte without notifying Plaintiffs who as a result did not file all of their evidence on that issue. The Defendant had only addressed the final policymaker issue and had offered no evidence rebutting Plaintiffs claim that the

City's policies and customs were the moving force behind the retaliatory evictions, arrest without probable cause, etc.

Plaintiffs were in a situation where the custom claim had been twice upheld by the previous District Court judge in orders partially denying motions to dismiss/summary judgment and an appeal to the Eleventh circuit and was not challenged by the Defendant. Plaintiffs concentrated in establishing the "causal link" between the protected speech and the retaliation as explained supra ('moving force' and shifting burden of proof).

Plaintiff, at the closing of discovery had transferred to Defendant irrefutable proof, not only of the City's policymakers knowledge but of their involvement in the retaliatory conduct. Those memos and transcripts of public record were not in evidence prior to the judge's ruling.

The District Court erred in not notifying Plaintiffs to file all of their evidence for purposes of sua sponte Summary Judgement by the Court. See Celotex Corp. V. Catrett, 477 U.S. 317, 326, 106 S.ct. 2548, 2554, 91 L.Ed 2d 265 (1986)

CONCLUSION

It would be beneficial to address the future of what appears to be a serious loophole in the rules governing municipal liability. The present situation creates a complete uncertainty for complainants who, like Plaintiffs apply due diligence in attempting to exhaust all administrative remedies and end up suing for redress only to be denied that right based on some incomprehensible technicality.

---

1. -City Manager's office directing police to go arrest Plaintiff: "Throw the book at him..... he's been giving us a hard time."

-Memo - from 2nd Bight Manager notifying Mayor he is changing tenancy at will rules at the dock so as to evict Plaintiffs immediately.

Little did they know, that the city official who had been clearly identified , by everyone, as the final policymaker was a decdy policymaker and the real one who played dead was to come back to life to have the case dismissed in the eleventh hour.

There must be a solution to this sort of dilemma. There should be some degree of accountability, some link, between the immunity and how clearly the law defines, not only whether a particular official has a supervisor, but whether a citizen's right to obtain review is reasonably framed as to the essential elements of how, when and to whom he should present a request for review.

To invoke the Monell defense a city should have to come forward, not only with some evidence that it is written somewhere that an official has a supervisor , but it should also make a showing that a particular Plaintiff had, by law, a clear, reasonable, and enforceable avenue to obtain review by the purported supervisor (final policymaker).

Absent such a clear showing, proof that a statutory supervisor deliberately refused to review should be construed as an act of the final policymaker endorsing its subordinate's decision and giving rise to city liability.

So there should be a statutory method for citizens to address the vanishing final policymaker syndrome rather than to have no alternative but to interview half the town and research twenty years of journalistic history and public record to figure if their case wouldn't, by any chance, be part of a wide-spread custom.

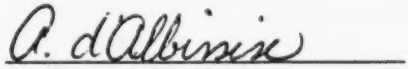
If such a wide-spread custom can be evidenced, of course, it becomes another way for a plaintiff to have liability attach to the municipality. The difficulty is that the standard of city involvement has been made so high by certain circuits that the custom remedy can barely be distinguished from the "isolated incident" standard.

Unconstitutional custom should not be treated as official policy or deliberate political guidance. No one actually invented or created the custom of retaliation against free speech, the City of Hattisburg in Adickes v. S.H. Kress and Company, 90 S.Ct.1598 (1970) didn't invent racism. The unveiling of a 'custom' is only a mapping of human weaknesses for prejudice and intolerance. It is rather like a disease and the question is less who created or knows about it than who is infected with it. The real questions are: Has it reached the higher levels of government or not? Are the policymakers plagued with retaliatory animus?

Plaintiffs should not have to show actual knowledge of 'wide-spread' practice, they should have to show that such a practice exists and that in instances of clear knowledge of misconduct similar to the one championed by the custom, the City's final policymakers appear deliberately indifferent and fail to act towards redress.

Plaintiffs had the right to voice their opinions without being thrown in jail, financially ruined, and ostracized by the City of Key West. They respectfully request the opportunity to brief this honorable court about these issues.

Respectfully submitted,



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No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS
Vs.
THE CITY OF KEY WEST - RESPONDENT

_____

PROOF OF SERVICE

I, Naja GIRARD, do swear or declare that on this date, December ____, 2003, as required by Supreme Court Rule 29 I have served 3 copies of the enclosed PETITION FOR WRIT OF CERTIORARI and the APPENDIX on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

David J. Audlin, Jr. , Esq.
415 Eaton Street
Key West, FL 33041

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16th, 2003.

Supreme Court, U.S.
FILED

03 925 SEP 13 2003

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS

Vs.

THE CITY OF KEY WEST - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16404
Non-Argument Calendar

D.C. Docket No. 95-10074-CV-KMM

ARNAUD GIRARD,
NAJA BISSAR,

Plaintiffs-Appellants,

versus

CITY OF KEY WEST,
MARC SUMMERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 25, 2001)

Before EDMONDSON, WILSON, and GODBOLD, Circuit Judges.

PER CURIAM:

APPENDIX A

Plaintiffs-Appellants Girard and Bissar ("Girards" or "Plaintiffs"), proceeding pro se, filed this 42 U.S.C.§ 1983 action against Defendants-Appellees, City of Key West and several City employees ("City" or "Defendants") in their official capacities. The district court found no municipal liability under section 1983 and granted Defendants' motion for summary judgment. The district court held that each of the challenged acts was subject to meaningful administrative review and did not represent official policy or actionable custom. Plaintiffs now appeal. We affirm.

I. Standard of Review

We review de novo a district court's order granting summary judgment. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1357 (llth Cir. 1999).

II. Background

Arnaud Girard and Naja Bissar, husband and wife, owned a sailboat that was moored at a dock where tenants were permitted to live aboard their vessels, and a shop at the Key West Bight Marina. Ms. Bissar (Girard) leased a small commercial space for her shop from the City of Key West. The lease included the use of the shop space and one dinghy space at the City dock for which she was not charged. The Girards were tenants of the Key West Bight Marina for at least a year and a half. The City was responsible for overseeing the operation of the marina by and through the City Manager and the Key West Bight Management District Board ("Board").

The City had an opportunity to lease to a private ferry company part of the dock space at which tenants were permitted to live aboard their vessels, and adjacent upland. This meant possible eviction of the tenants at the dock, including the Girards. In response the Girards outwardly opposed the leasing by organizing a tenants association and notifying the local media of tax problems with the City's plan.

The Girards claim that after they began publicly opposing the City's proposed actions regarding the docks the city subjected them to a number of retaliatory actions including: (1) a Bight Manager's decision to evict them from the commercial shop, that was upheld by the Board; (2) a Bight Manager's decision to evict the sailboat, that was upheld by the Board; and (3) the City's ultimate decision to evict Plaintiffs from the commercial shop.

III. Procedural History

The Girards originally alleged violations of the Equal Protection Clause and the First Amendment. The district court dismissed all claims except a due process/deprivation of property claim and a pendent state claim. The jury returned a verdict in favor of the City on the remaining claims. On appeal this court affirmed on all claims except the equal protection claim, which it reversed and remanded. Girard v. City of Key West, No. 97-5621 (llth Cir. December 21, 1998). Back in the district court the court permitted plaintiffs to file a second amended complaint that raised numerous alleged equal protection violations that had been alleged on other grounds in the appeal and had been denied. Also plaintiffs alleged a new First Amendment/free speech claim based on events allegedly occurring subsequent to the dismissal of the first complaint. On consideration of the second amended complaint the district court granted summary judgment in favor of the City by applying §1983 and holding that each of the challenged City acts was subject to meaningful administrative review and did not represent official policy or actionable custom.

IV. Discussion

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...
>
> 42 U.S.C. §1983.

Under §1983 a plaintiff must first establish that a defendant is acting under a "statute, ordinance, regulation, custom, or usage." Id. Next the plaintiff must prove that he or she is deprived of "rights, privileges, or immunities secured by the Constitution and laws." Id.

Municipalities may not be held liable under section 1983 on the theory of respondent superior. See Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978). Rather they may be held liable only if such constitutional tort results from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law. See id. at 694,98 S.Ct. At 2037-38; Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (llth Cir. 1997). For the actions of a government official to be deemed representative of the municipality the acting official must be vested with final policymaking authority. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986)

There are three issues before this court. First, whether Bight Management were officials vested with final policymaking authority. Second, whether an unconstitutional custom or practice existed. Third, whether a constitutional deprivation occurred.

A. FINAL POLICY MAKING AUTHORITY

Section 1983 liability may be based upon a single illegal act by a municipal officer only when the act fairly represents official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. See Scala v. City of Winter Park, 116 F.3d 1396, 1397 (11th Cir. 1997). "Final policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review." Id. At 1401. "Meaningful review" means the opportunity for meaningful review. See id. at 1402. "[I]t is clear that [officials] do not become final policymakers for [§] 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed." Id. Under this principle we find Plaintiffs' contention that Bight Management possessed final policymaking authority unpersuasive.

1. BIGHT MANAGEMENT

Section 24 City of Key West Code states the relevant law concerning the final policymaking authority of City Bight Managers. Section 24.03 provides in relevant part:

> The [Key West Bight Management District Board] shall have the following duties:
> (a)(7) Review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding the terms and management of rental property and administration of leases shall be final. KEY WEST, FLA., ORDINANCE ch. 93, §. 24 (1996)

The ordinance is clear on its face. "The board shall review all conflicts between the [Bight] manager and tenants." Id. Also Plaintiffs acknowledge that the Board did review two of the Bight Managers' decisions regarding tenant conflicts. Therefore decisions made by the Bight Manager regarding tenant conflicts are subject to meaningful review. Hence the Bight Manager is not the final policymaker with respect to the subject matter in question[1] the Bight Manager's decisions do not trigger municipal liability under section 1983.

2. KEY WEST BIGHT MANAGEMENT DISTRICT BOARD

Plaintiffs contend that municipal liability attached under section 1983 as to two of the Bight Managers' challenged acts that were reviewed and upheld by the Board: (1) eviction of Plaintiffs from the commercial shop and (2) eviction of Plaintiffs' sailboat. Plaintiffs assert that the district court held that Key West Bight Management District Board was the final policymaker. The district court did not so hold. Rather the court ruled that Plaintiffs challenged various decisions made by city officials, not by the reviewing board.

B. POLICY OR CUSTOM

Plaintiffs contend that the City's policies and custom caused civil rights deprivations. For the city to be held liable under the custom or practice prong of Monell a Plaintiff must demonstrate that the alleged constitutional deprivation is so well-settled and pervasive that it assumes the force of law. See Denno v. School Bd. Of Volusia County, Fla.,

1. Plaintiffs contend that Bight Management is the final policymaker regarding availability of dock space to non-tenants. It is not. The City Manager's supervisory authority is over the Bight Manager. See KEY WEST, FLA., ORDINANCE ch. 93, §24 (1996). Since the City Manager supervises Bight Management the decisions of Bight Management are subject to meaningful administrative review. Therefore Bight Management is not the final policymaker regarding availability of dock space to non-tenants.

F.3d 1267, 1277 (11th Cir. 2000). The district court held that Plaintiffs have not presented evidence creating a genuine issue of fact as to a pervasive custom of constitutional deprivations so as to make the City potentially liable under section 1983. The district court did not err in holding that Plaintiffs did not adduce evidence establishing that the alleged constitutional torts resulted from a policy officially adopted by Defendant under the Monell doctrine. Plaintiffs contend that the district court ruled sua sponte on a motion for summary judgement without giving Plaintiffs notice and the opportunity to present evidence. The district court did not err in holding that this contention is wholly without merit.

We hold that Bight Management were not officials vested with final policymaking authority and an unconstitutional custom or practice did not exist. Hence the final issue is moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case No. 95-10074-CIV-MOORE

ARNAUD GIRARD and NAJA GIRARD,

CLOSED CIVIL CASE

FINAL JUDGMENT

Plaintiffs,

vs.

THE CITY OF KEY WEST,

Defendant.

_____/

Filed by "s/____" D.C.
NOV 2 2000
Clarence Maddox
Clerk, U.S. Dist. Ct. S.D Fla, Miami

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE #117). The Court having entered an Order granting Defendant's Motion, it is

ORDERED AND ADJUDGED that Final Judgment is entered in favor of Defendant and against Plaintiffs Arnaud Girard and Naja Girard.

The Clerk of Court is directed to mark this case CLOSED. All pending motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 2nd day of November, 2000.

S/: _____
K. MICHAEL MOORE
U.S. DIST. JUDGE

cc: Arnaud Girard, pro se
Naja Girard, pro se
David J. Audlin, Jr., Esq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case No. 95-10074-CIV-MOORE

ARNAUD GIRARD and
NAJA GIRARD,
Plaintiffs,
vs.
THE CITY OF KEY WEST,
Defendant.
_____/

ORDER

Filed by s/_____ D.C.
NOV 1 2000
Clarence Maddox
Clerk U.S. Dist. Ct.
So. Dist. Fla. Miami

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE #117), Plaintiffs' Motion for Partial Summary Judgment (DE #124,125), and Plaintiffs' Second Motion for Partial Summary Judgment (DE #133).

UPON CONSIDERATION of the motions, responses, materials submitted, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

Background

On November 14, 1995, Plaintiffs Arnaud and Naja Girard ("Plaintiffs"), proceeding pro se, filed this action against Defendant City of Key West, Florida ("Defendant" or "City") and several City employees in their official capacities alleging deprivation of constitutional rights in violation of 42 U.S.C. sec. 1983 ("Section 1983"). Specifically, Plaintiffs alleged that the City and the individual defendants had violated: (1) their right to equal protection of the laws by refusing to rent dock space to them at the Key West Marina, evicting them from a public dinghy dock, and towing their belongings without proper notice; (2) their right to due process

of the law by depriving Plaintiffs of a liberty interest in access to the dock and a property interest in their personal property without notice or opportunity to be heard; and (3) their First Amendment right to free speech by retaliating against Plaintiffs for organizing a tenants association. Plaintiffs also brought a pendent state law claim alleging that Plaintiff Arnaud Girard had been maliciously arrested and prosecuted without probable cause.

By Order dated April 30, 1996, the Court dismissed with prejudice the equal protection claim, the First Amendment claim, the due process claim involving the deprivation of dock space, and all claims against the individual defendants. The case proceeded to trial on the malicious prosecution claim and the due process claim involving deprivation of property. A jury trial was held before Judge James C. Paine in June 1997, and the jury returned a verdict for Defendant on both claims.

Plaintiffs subsequently appealed the dismissal of their equal protection, First Amendment, and due process liberty interest claims. The Eleventh Circuit affirmed the dismissal of the First Amendment and the due process liberty interest claims, but ruled that the equal protection claim should have been allowed to go forward.

On May 10, 1999, Plaintiffs filed their Second Amended Complaint, alleging: (1) the equal protection claim which the Eleventh Circuit ruled should have been allowed to proceed; and (2) a new First Amendment claim based upon events allegedly occurring after the dismissal of the previous First Amendment claim. By Order dated November 30, 1999, this Court adopted the Report and Recommendation of Magistrate Judge John J. O'Sullivan and denied Defendant's Motion to Dismiss the Second Amended Complaint.

Defendant now moves for summary judgment. In its Motion for Summary Judgment, Defendant contends that there is no municipal liability under Section 1983 in this case

because each of the challenged acts were subject to meaningful administrative review and did not represent official policy. In response, Plaintiffs filed a Motion for Partial Summary Judgment and, three days later, a Second Motion for Partial Summary Judgment.

Discussion

I. Summary Judgment Standard

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56© of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. See Twiss v. Kury, 25 F.3d 1551, 1554 (11thCir. 1994). The moving party has the burden of meeting this exacting standard. See Adickes v. S.H. Kresws & Co., 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id.

In applying this standard, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. See id. However, the non-moving party:

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e), Fed. R. Civ. P. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,252 (1986).

In other words, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. V. Zenith Radio, 475 U.S. 574, 586 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Anderson, 477 U.S. at 254. If the non-movant fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. See id. at 254-55.

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. V. Catrett, 477 U.S. 317, 322-323 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. See id.

II. Section 1983

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983. In Monell v. Dep't of Soc. Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court held that municipalities may not be held liable under Section 1983 on a theory of respondeat superior. Rather, municipalities may only be liable for the execution of a governmental policy or custom. The Monell Court explained:

> [It] is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [section] 1983.

Id. At 694. "A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality ... A custom is a practice that is so settled and permanent that it takes on the force of law." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997), cert. denied, 522 U.S. 1075, 118 S.Ct. 852, 139 L.Ed.2d 753 (1998) (citations omitted). As the Supreme Court recognized:

> Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality .... Similarly, an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.

Bd. Of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403-404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (citations omitted). Accordingly, municipalities may be held liable only if constitutional deprivations result from (1) a policy, either officially adopted or created by the actions of an official fairly deemed to represent government policy, or (2) a custom so pervasive and well-settled that it assumes the force of law. Denno v. Sch. Bd. Of Volusia County, Florida, 218 F.ed 1267, 1276 (11th cir. 2000); Sewell, 117 F.3d at 489.

Plaintiffs have not adduced evidence establishing that the alleged constitutional torts resulted from a policy officially adopted by Defendant within the meaning of Monell.[1] Rather than attempting to establish any formally adopted policy, Plaintiffs primarily assert that an illegal governmental policy was established through various actions taken by City officials. Specifically, Plaintiffs allege that their equal protection and First Amendment rights wre violated by the following

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1 While Plaintiffs do allege that the City maintained a policy "not to do business with people suing the City," the City Commission transcripts cited by Plaintiffs as support do not establish the formal adoption of such policy by the City.

incidents: (1) the denial of Plaintiffs' requests for dock space for their private yacht, the "Coco Loco," at a city-owned marina by City "Bight Managers" (also referred to as "Dockmasters"); (2) a Bight Manager's decision to evict Plaintiffs from a dinghy dock in the Key West Bight Marina; (3) a Bight Manager's decision to evict Plaintiffs from commercial shop space; (4) the towing of Plaintiffs' trailer by the City of Key West Police Department, allegedly at the direction of a Bight Manager; (5) a Bight Manager's removal and disposal of Plaintiffs' personal belongings left in a common area in front of their shop at the Key West Harbor; (6) the arrest of Arnaud Girard by the City of Key West Police Department on charges of burglary of the marina bathroom, allegedly at the request of a Bight Manager; and (7) a Bight Manager's decision to evict Plaintiffs' vessel, the "Gaspard." (See Second Amended Complaint).

Section 1983 liability may be premised upon a single illegal act by a municipal officer only when the challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. In Scala, the Eleventh Circuit held that "[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review." Id. at 1401. See also Morro v. City of Birmingham, 117 F.3d 508, 514 (11th Cir. 1997), cert. denied, 523 U.S. 1020, 118 S.Ct. 1299, 140 L.Ed.2d 465(1998). As the United States Supreme Court has made clear, the issue of whether city officials are final policymakers, so as to trigger municipal liability under Monell, presents a question of law:

> [T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury.

> Reviewing the relevant legal materials, including state and local positive law, as well as custom or usage having force of law, the trial judge must identify those officials or governmental bodies who speak with the final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989) (citations omitted); Scala, 116 F.3d at 1398 (quoting Jett).

Section 24 of the City of Key West code sets forth the relevant law concerning the final policymaking authority of City Bight Managers. Section 24.03 provides in relevant part:

> The [Key West Bight Management District Board] shall have the following duties:
>
> ***
>
> (a)(11) The board shall review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding day to day operation of the Key West Bight Marina, the terms and management of rental property and administration of leases shall be final.

Based upon review of these provisions of the Key West Code, the court concludes that any decision made by a Bight Manager was subject to meaningful review by the Key West Bight Management District Board. Accordingly, any decision made by a Bight Manager cannot trigger municipal liability under Section 1983, as explained in Monell, as the Bight Manager does not have final decisionmaking authority.

In their motions for summary judgment, Plaintiffs contend that the Bight Managers' denial of their request for dock space and decision to evict them from a dinghy dock was confirmed by the Acting City Attorney, who acted with final policymaking authority on behalf of the City. (See Exhibits 4 and 5 to Plaintiffs' Motion for Partial Summary Judgment). However, the fact that the Acting City Attorney communicated the decisions made by the Bight Managers to Plaintiffs did not negate their opportunity to have the decisions reviewed by the Key West Bight Management District Board.

Plaintiffs also contend the municipal liability under Section 1983 attaches as to two of the challenged acts, the bight Manager's decision to evict Plaintiffs from their commercial shop space and eviction of the "Gaspard," because these decisions were actually reviewed by Key West Bight Management District Board, and thus, the decisions were made by a final policymaker. However, Plaintiffs have challenged various decisions made by city officials, not by the reviewing board. Thus, the relevant inquiry under Scala is whether meaningful review of the officials' decisions was available. See Scala, 116 F.3d at 1403 (holding no municipal liability based upon finding that city officials were not final policymakers with respect to employment termination decisions at municipal fire department where the decisions were reviewed by the city civil service board). See also Morro, 117 f.3d at 514 (applying Scala and stating in dicta that, had the city preserved the issue for trial, officials would not be final policymakers because their decision was reviewed by the county personnel board).[2] The fact that the Key West

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2. The court notes criticism of the holding in Scala insulating a city from liability under Section 1983 when an municipal officials's decision is reviewed by a city-affiliated board. See Vincent v. City of Talladega, 980 F.Supp. 410, 418-19(N.D. Ala 1997) (questioning Scala's rule that review by a city-affiliated board can truly provide "meaningful review"). Nonetheless, this court

Bight Management District Board actually reviewed the Bight Managers' decisions supports the conclusion that the Bight Managers do not have final policymaking authority.[3]

As relates to the towing of Plaintiffs' trailer and the arrest of Plaintiff Arnaud Girard by the Key West Police, the record indicates that such decisions were made by individual police officers. However, nothing in the record establishes that individual police officers in the Key West Police Department had the authority to establish final policy for the City with regard to arrests and decisions to tow property. Rather, such decisions are reviewable by the police officers' chain of command, up to the Chief of Police, as well as by the City Manager. (See Affidavit of John Jones ¶ 4 and attached Exhibits A (Key West Police Directives Manual) and B(Article IV of the Key West Code)). To the extent that Plaintiffs allege that the police officers performed the challenged acts at the direction of Bight Managers, the Court has previously concluded that Bight Managers do not have final policymaking authority.

Finally, the Court finds that Plaintiffs have not presented evidence creating a genuine issue of fact as to a pervasive custom of constitutional deprivations so as to make the City potentially liable under Monell. In order to establish municipal liability under the custom prong of Monell, Plaintiffs must demonstrate that their alleged constitutional

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concludes, as did the court in Vincent, that Scala is the law of the Eleventh Circuit and binds this Court's decision.

3. The fact that the other challenged decisions were not reviewed by the Key West Bight Management district Board does not change this Court's conclusion. The Eleventh Circuit equates "meaningful review" with the opportunity for meaningful review. See Scala, 116 f.3d at 1402 ("[I]t is clear that [officials] do not become final policymakers for [Section] 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed").

deprivations resulted from a custom within the City so well-settled and pervasive that it assumes the force of law. Denno, 218 F.3d at 1277; Sewell, 117 F.3d at 489. That is, Plaintiffs must demonstrate a "persistent and widespread practice" of constitutional deprivations about which the City knew or of which practice it had constructive knowledge. Denno, 218 F.3d at 1277.

In its motions for partial summary judgment, Plaintiffs make numerous allegations in support of their contention that the City ratified a widespread practice of constitutional deprivations by its officials. First, Plaintiffs allege that City officials acted according to a policy of "not doing business with people suing the City," which was "reaffirmed several times at City commission meetings" (Plaintiffs Opposition, Part I, at 7). However, even assuming that the transcripts cited by Plaintiffs supported the existence of such informal policy, Plaintiffs have failed to establish that the City officials, in making the challenged decisions, acted pursuant to such policy, or more importantly, that any final policymaker knew that the officials were acting pursuant to such policy. That is, Plaintiffs have failed to demonstrate that a custom or policy of not doing business with people suing the City was the "moving force" behind the alleged constitutional deprivations. Monell, 436 at 690-94. Plaintiffs' conclusory statement that "four consecutive Dockmasters carried out the same type of actions with the same discriminatory animus" (Plaintiffs' Opposition, Part II, at 2) does not establish such knowledge by the City. Furthermore, while Plaintiffs contend that other people have complained to the City of unequal treatment and free speech retaliation (Plaintiffs' Exhibits 28,29,and 30), Plaintiffs have not presented any evidence that the City or any of its final policymakers had knowledge of a "persistent and widespread practice" of constitutional deprivations through such complaints. Finally, Plaintiffs' unsupported allegation of the City's "deliberate indifference regarding policies in training of employees in matters of equal protection and [F]irst

[A]mendment rights" (Plaintiffs' Opposition, Part II, at 1) is not sufficient to create a genuine issue of fact as to a pervasive custom of constitutional deprivations.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED THAT Defendant'S Motion for Summary Judgment (DE #117) be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' Motion for Partial Summary Judgment (DE #124,125) and Plaintiffs' Second Motion for Partial Summary Judgment (DE # 133) are DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of November, 2000.

S/:_____

K. MICHAEL MOORE
U.S. DIST. JUDGE

cc: Arnaud Girard, pro se
Naja Girard, pro se
David J. Audlin, Jr., Esq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10074-CIV-PAINE

ARNAUD GIRARD and
NAJA BISSAR,
Plaintiffs,

vs.

THE CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR and
EDWARD SCHERDIN,
DONNA WAGNON, and
ROBERT WINTERBOTTOM,
Defendants.

_____/

FILED by _____ D.C.
APR 30 1996
Carlos Juenke
Clerk U.S. Dist. Ct.
S.D. of FLA, WPB

ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

This matter is before the court upon the Defendants' Motion to Dismiss the Amended Complaint which was filed pursuant to leave of court, upon dismissal of the Original Complaint without prejudice.

On consideration of a Motion to Dismiss, all well pled allegations of the complaint must be taken as true and construed favorably to the pleader. Schuer v. Rhodes, 416 U.S. 232, 236 94 S.Ct. 1683, 1686 (1974); Jacobs v. Board of Regents, 473 F. Supp 663 (S.D. Fla. 1979). Consideration of matters beyond the four corners of the complaint is improper in the context of a motion to dismiss. Milburn v. United States, 734 F.2d 762 (11th Cir. 1984). The rules of pleading

under the Federal Rules of Civil Procedure are very liberal. Rule 8(a) merely requires that the complaining party provide

> (1) a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it (2) a short, plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Under the standard established by Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), a motion to dismiss should not be granted unless the Plaintiff can prove no set of facts in support of his claim entitling him to relief.

Further, pro se complaints are not held to stringent standards expected of pleadings drafted by lawyers. In contrast, pro se complaints are to be liberally construed. Haines v. Kerne, 92 S.Ct. 594, 595 (1972).

COUNT I – EQUAL PROTECTION

In Count I, the Plaintiff's claim that the city of Key West's refusal to grant them dock space at the Key West Bight constituted a deprivation of equal protection under the law. However, just as in the original Complaint, there is absolutely no allegation in this Complaint that these Plaintiffs are members of a suspect, protected class. When state action does not affect a suspect class, courts presume that the action is valid and only find it unconstitutional when the state action lacks any relation to a permissible government objective. Kite v. Marshall, 661 F.2d 1027, 1030 (5th cir. 1981), cert. Den., 102 S.Ct. 2934.

The Plaintiffs have also not alleged that any of the city of Key West laws affecting Plaintiffs in the complained of situations is discriminatory. The controlling law provides that a plaintiff who alleges that a governmental agency unequally applied a facially neutral law is required to show intentional discrimination to be successful on his equal protection claim.

E&T realty v. Strickland, 830 F.2d 1107 (11th Cir. 1987).

Because the Plaintiffs have, on two occasions, attempted but failed to allege a sustainable equal protection claim, Count I must be dismissed with prejudice.

COUNT II – DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Generally, a §1983 cause of action lies against a Defendant who, acting under color of state law, deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Bendiburg v. Dempsey, 909 f.2d 463, 468 (11th Cir. 1990). The two elements a plaintiff must allege in bringing an action under §1983 are: 1) that the conduct complained of was committed by a person acting under color of state law; and 2) that this conduct deprived a person of rights, privileges, or immunities secured by the constitution of the United States. Adickes v. S.H. Kress & Co., 90 S.Ct. 1598, 1604 (1970). However, in an action like the present action, against a municipality, the Plaintiff must also plead and prove that official custom or policy was the moving force behind the constitutional violation. Monell v. Department of Social services, 98 S.Ct. 2018 (1978). The law is clear that a municipality may not be held liable under §1983 on a respondeat superior theory. Id.; Brown v. city of Fort Lauderdale, 923 F.2d 1474, 1479 (11th Cir. 1991). Further, because a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered," Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1298 (1986), its liability can never be premised on the result of a random and unauthorized act. To establish the existence of a practice or custom:

> it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Depew v. City of St. Mary's, 787 F.2d 1496, 1499 (11th Cir. 1986). Proof of a single incident of unconstitutional activity is not sufficient to impose liability. City of Oklahoma city v. Tuttle, 105 S.Ct. 2427 (1985) (plurality opinion).

Therefore, the court must evaluate the present Amended Complaint for the existence of facts and allegations to support the finding of 1) color of state law; 2) deprivation of rights; and 3) official custom or policy.

In Count II, the Plaintiffs claim that the actions of the City of Key West, through its employees, constituted a deprivation of property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution. The Plaintiffs Amended Complaint addresses the deprivation of their personal property without notice on several occasions. The Constitution provides that "[N]o State [shall] deprive any person of life, liberty, or property, without due process of law." This clause applies to states and their political subdivisions through the Fourteenth amendment. See Wheeler v. Pleasant Grove, 833 F.2d 267, 270 n.3 (11th Cir. 1987), reh. den. 844 F.2d 794 (1988) (en banc). Of course, the Plaintiffs' personal belongings disposed of by city employees, falls under the rubric of "property" governed by the due Process clause. The constitution guarantees that a person cannot be deprived of property except pursuant to constitutionally adequate procedures. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1493 (1985). Those guarantees require notice and an opportunity to be heard. Mullane v. central Hanover Bank & Trust Co., 70 S.Ct. 652, 656-57 (1950). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." Mullane, 70 S.Ct. At 657.

In the present case, the Plaintiff alleges that on at least 4 occasions (more than a single, isolated incident), the management of the Key West Bight disposed of property

belonging to the Plaintiffs and that the disposal was without notice. The City cannot be held liable under §1983 if the acts of deprivation were isolated and apparently random acts against the Plaintiffs. However, reviewing count II of the amended Complaint in light of the relaxed standard which is to be applied to pro se complaints, the court finds sufficient allegations that the acts of deprivation were taken by City employees, through a policy or custom of the city, or were, at least, authorized by the City's governing authority. Accordingly, Defendants' Motion to Dismiss Count II must be denied.

COUNT III – ARREST AND PROSECUTION WITHOUT PROBABLE CAUSE

This claim, a claim for malicious prosecution, has already been determined by the court to be sufficient as alleged against the City of Key West. See, Court's Discussion of count I of original complaint. Accordingly, inasmuch as the Defendant city has failed to raise any new grounds for dismissal, the city's Motion to Dismiss Count III must be denied. Regarding liability of the individual Defendant, see discussion, infra.

COUNT IV – VIOLATION OF SPEECH AND FREEDOM OF ASSOCIATION

In Count IV the Plaintiffs again seek redress for alleged constitutional violations, this time based upon First Amendment (freedom of speech). The first Amendment provides that congress shall make no law abridging the freedom of speech. Through the Fourteenth Amendment, The First Amendment is applicable to the states. The Plaintiffs do not allege that the city of Key West has in place any law that works to abridge the Plaintiffs' Freedom of Speech. Therefore, as stated in this court's previous order, the facts as alleged, even when accepted as true, would not support a finding of liability against the City for violations of the Plaintiffs' first Amendment rights. Accordingly, Count IV

must again be dismissed. The facts concerning retaliation and prosecution without probable cause, are redressed in Count III in which the Plaintiff claims malicious prosecution and do not constitute a First Amendment claim. Accordingly, Count IV will be dismissed.

The Individual Defendants

The style of the Amended Complaint names, in addition to the city of Key West, Defendants Mark Summers, the City's Bight Dockmaster; Leslie Dougall-Sides, acting City Attorney at the time of the incident; Findlay Sinclair, the City's Bight Manager; and Edward Scherbin, the City's Bight Dockmaster; and Donna Wagnon and Robert Winterbottom, police officers. In the Amended Complaint, the Plaintiffs demand damages against these individual Defendants.

Under §1983, individuals may be held liable for otherwise governmental actions where those individuals violate the federal Constitution, and Plaintiffs seek a nominal damage remedy. See Scheuer v. Rhodes, 416 U.S. 232 (1974). Therefore, the court must consider the substance of Plaintiff's §1983 claim to determine liability.

A review of the Complaint reveals that the Plaintiffs have identified the individual Defendants as "City Officials" and further allege that each took action against the Plaintiffs in their official capacity. Specifically, the essence of the Plaintiffs' Amended Complaint remains to be that the Defendants unlawfully took possession and disposed of Plaintiff's property, without due process of law. There is no factual allegation in the Complaint which would support a finding that these individuals took action against these Plaintiffs which was either beyond the scope of their employment or which was so arbitrary so as to constitute gross abuse of the lawful powers of office. Likewise, because there are no factual allegations that these individual Defendants acted in a manner exhibiting wanton and willful disregard of human rights, safety or property, they are

shielded from individual liability on the state law claims by Florida Statute 768§.28(9)(a). Accordingly, the Amended Complaint against the individual Defendants must be dismissed with prejudice, for failure to state any claim against them in their individual capacities.

In view of the foregoing, it is

ORDERED and ADJUDGED that the individual Defendants' Summers, Dougall-Sides, Sinclair, Scherbin, Wagnon, and Winterbottom's Motion to Dismiss is GRANTED. The Complaint is dismissed as to these Defendants in their individual capacities, with prejudice. It is further

ORDERED and ADJUDGED Defendant City of Key West's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART. It is denied as to Counts II and III and granted as to Counts I and IV. Counts I and IV are dismissed with prejudice. Within 10 days of the date of this order, the Defendant City of Key West shall file an Answer to the remaining counts of the Amended Complaint. For clarification, the present case is a two-count complaint for deprivation of property without due process of law (premises solely upon the Defendant's alleged confiscation and destruction of Plaintiffs' personal property), and a pendent state claim for malicious prosecution. The City of Key West is the only remaining Defendant. All discovery and substantive issues shall be limited to these two claims and this single Defendant. All discovery and substantive issues shall be limited to these two claims and this single Defendant and the factual allegations relating to the dismissed claims are not relevant and need not be proved at trial.

DONE and ORDERED at West Palm Beach, Florida, this 30th day of May, 1996.

S:_____
JAMES C. PAINE
U.S. DISTRICT JUDGE

Copies furnished to:

Diane Tolbert Covan
City Attorney
P.O. Box 1409
Key West, FL 33040

Arnaud Girard and Naja Bissar
P.O. Box 6263
Key West, FL 33041

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10074-CIV-PAINE

ARNAUD GIRARD and
NAJA BISSAR,
Plaintiffs,

vs.

THE CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR and
EDWARD SCHERDIN,
DONNA WAGNON, and
ROBERT WINTERBOTTOM,
Defendants.

_____/

FILED BY___D.C.
MAY 14 1997
Carlos Genk
Clerk U.S. Dist. Ct.
S.D. of FLA WPB

ORDER ON DEFENDANTS' MOTION TO STRIKE, SECOND MOTION TO DISMISS AMENDED COMPLAINT, AND MOTION FOR SUMMARY JUDGMENT

This matter is before the court upon the Defendants' Motion to Strike, Motion to dismiss and Motion for summary Judgment (DE 39-1 (DE39-2) (DE 39-3). The Plaintiff conceded that, as a pro se litigant, he is not entitled to an award of attorneys' fees unless he actually retains a lawyer. Accordingly, Defendant's Motion to Strike Plaintiff's claim for attorneys' fees will be granted.

On consideration of a Motion to Dismiss, all well pled allegations of the complaint must be taken as true and construed favorably to the pleader. Scheur v. Rhodes, 416

U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974); Jacobs v. Board of Regents, 473 F. Supp 663 (S.D. Fla. 1979). Consideration of matters beyond the four corners of the complaint is improper in the context of a motion to dismiss. Milburn v. United States, 734 F.2d 762 (11th Cir. 1984). The rules of pleading under the federal Rules of civil Procedure are very liberal. Rule 8(a) merely requires that the complaining party provide

> (1) a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it (2) a short, plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Under the standard established by Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), a motion to dismiss should not be granted unless the Plaintiff can prove no set of facts in support of his claim entitling him to relief.

Further, pro se complaints are not held to stringent standards expected of pleadings drafted by lawyers. In contrast, pro se complaints are to be liberally construed. Haines v. Kerner, 92 S.Ct. 594, 595 (1972).

COUNT II–DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Generally, a §1983 cause of action lies against a Defendant who, acting under color of state law, deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Bendiburg v. Dempsey, 909 f.2d 464, 468 (11th Cir. 1990). The two elements a plaintiff must allege in bringing an action under §1983 are:

1) that the conduct complained of was committed by a person acting under color of state law; and 2) that this conduct deprived a person of rights, privileges, or immunities

secured by the constitution of the United States. Adickes v. S.H. Kress & Co., 90 S. Ct 1598, 1604 (1970). However, in an action like the present action, against a municipality, the Plaintiff must also plead and prove that official custom or policy was the moving force behind the constitutional violation. Monell v. Department of social Services, 98 S.Ct. 2018 (1978). The law is clear that a municipality may not be held liable under §1983 on a respondeat superior theory. Id.; Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1479 (11th Cir. 1991). Further, because a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered," Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1298 (1986), its liability can never be premised on the result of a random and unauthorized act. To establish the existence of a practice or custom:

> it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Depew v. City of St. Mary's, 787 f.2d 1496, 1499 (11th Cir. 1986). Proof of a single incident of unconstitutional activity is not sufficient to impose liability. City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985) (plurality opinion).

Pursuant to the aforementioned authority and upon evaluation of the Amended Complaint, this court previously held that the Plaintiff's allegations that on at least 4 occasions (more than a single, isolated incident), the management of the Key West Bight disposed property belonging to the Plaintiffs and that the disposal was without notice were sufficient allegations of acts of deprivation taken by City employees, through a policy or custom of the city, or were, at least authorized by the City's governing authority. Accordingly, the court found that the allegations of the complaint, when accepted as true, constituted enforcement of an established

municipal procedure and were not random, unauthorized acts.

The Defendant now seeks dismissal of count I on the grounds that the Plaintiff failed to properly allege that state procedures available for challenging the alleged deprivation do not satisfy due process. Generally, there is no requirement that state judicial remedies be exhausted prior to the institution of a federal court§1983 action. In Monroe v. Pape, 365 U.S. 167, 183 (1961), the Supreme Court ruled that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[1] In Board of Regents v. Tomanio, 446 U.S. 478,491 (1980), the Court cited Monroe and again stated that "[t]his Court has not interpreted §1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section." Id. See also Majette v. O'conner, 811 F.2d 1416 (11th Cir. 1987) ("exhaustion of state administrative remedies is not a prerequisite to bringing a §1983 action."

The authority cited by the Defendant in this case for the proposition that the existence of an available state remedy, coupled with the Plaintiff's failure to pursue same, warrants dismissal of the §1983 claim is misapplied under the facts as alleged by this Plaintiff. Under the Parratt v. Taylor 451 U.S. 527 (1981) doctrine, as extended by the Court in Hudson v. Palmer, 468 U.S. 517 (1984), when a plaintiff alleges a violation of the due process clause of the fourteenth Amendment as a result of a "random and unauthorized act" rather than, as in the present case, the enforcement of an "established state procedure," the claim may be defeated on its merits if there exists postdeprivation state judicial

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1.Although the Court, in Monell v. Department of Social Services, 436 U.S> (1978) overturned that part of Monroe that held that municipal bodies were not subject to §1983 liability, Monell did not disturb the holding in Monroe that state judicial remedies need not be exhausted before commencement of a federal court § 1983 action.

procedures which satisfy due process. In the present case, the Plaintiff has not alleged isolated random or unauthorized acts but rather has alleged a concerted and established policy of the City of Key West to deprive him of his property without affording him due process. Accordingly, there is no requirement that this Plaintiff under these circumstances, pursue state judicial remedies prior to seeking redress pursuant to Section 1983. Under the well established rule set forth in Monroe, this Plaintiff has an absolute right to commence a federal court §1983 action without exhausting state judicial remedies.

Regarding the Defendant's second assertion that summary should be entered in its favor because the Plaintiff has admitted that the value of the personal property taken is only $350.00, the court finds that the Plaintiff's answer to the interrogatory also states that he is entitled to $30,000 in intangible compensatory damages. Accordingly, it cannot be said that there is no genuine issue of material fact that the value of this case is de minimus the amount of damages in this case is for the jury to determine. Accordingly, Defendants' Motion to Dismiss and Motion for Summary Judgment on Count II must be denied.

COUNT III–ARREST AND PROSECUTION WITHOUT PROBABLE CAUSE

This claim, a claim for malicious prosecution, has already been determined by the court to be sufficient as alleged against the City of Key West. See, Court's discussion of Count I of original complaint. Because the Plaintiff did not identify the legal basis upon which was proceeding in this Count entitled only "Arrest and Prosecution Without Probable Cause" and further because in his memorandum of law in opposition to the Motion to dismiss, he referred to the state claim of false imprisonment and never mentioned in reference

to that claim a §1983 deprivation, the court analyzed the claim to determine if the facts alleged sustained a cause of action under any claim and determined that the facts alleged a cause of action for malicious prosecution. Under that standard, the court determined that the individual Defendants who were acting within the course and scope of their employment as City employees, were shielded from individual liability, pursuant to Florida Statute §769.28(9)(a).[2]

Although the Defendant City has not raised the issue of §769.28 sovereign immunity on the merits in its most recent Motion to Dismiss, the Plaintiff has asked for clarification of the standard in light of this court's previous orders. For purposes of saving time during trial, the court will clarify the applicable standard. The claim for malicious prosecution and/or §1983[3], remains pending solely against the City. Accordingly, pursuant to §768.28, liability may only attach if the complained-of acts by the individual employees were not taken in bad faith or with malicious purpose. As previously noted regarding the element of malice in a

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2. For purposes of analyzing the still pending §1983 claim alleged in Count II, the court likewise determined that the individual Defendants were not subject to §1983 liability because the facts of the amended Complaint did not support a finding that the individuals were acting outside the scope of their employ as city officials. Accordingly, the standard for purposes of establishing individual and municipal liability, is a mere distinction without a difference in the ultimate outcome.

3. Because none of the pretrial rulings would differ and further because the Defendant has been aware of the facts underlying this claim throughout the litigation, and the facts support a cause of action under either theory, the court will permit the Plaintiff, if he chooses, to submit this claim to the jury as a §1983 claim against the City instead of a malicious prosecution claim. Under §1983, the claim against the City is not barred by respondeat superior because the Plaintiff challenges the established policy of the City as effected by its employees in the course and scope of their employment; the employees are still immune from individual suit because they were acting within the scope of their employment. Further, the Amended Complaint alleges a warrantless seizure without probable cause, a valid basis for a §1983 claim.

malicious prosecution case, it is not necessary for the Plaintiff to prove actual malice; legal malice is sufficient and may be inferred from, among other things, lack of probable cause, gross negligence, or great indifference to persons, property, or rights of others. Alamo Rent-a-Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994). In the present Complaint, where the Plaintiff Girard alleged that he was arrested and taken to jail on a felony charge of burglary, that the Defendant city, through its policy, officials and police, was the legal cause of origin of the proceeding against him, that the presiding judge found no probable cause and released him, thereby terminating the criminal proceeding in his favor, this court inferred malice from the allegation of lack of probable cause and denied the Motion to Dismiss. Accordingly, if the jury at trial finds as a matter of fact that the Plaintiff's arrest was without probable cause, malice on the part of the City itself through the concerted efforts of its employees who were acting, as the Plaintiff alleges, pursuant to established City policy, may be inferred. Accordingly, a finding of liability against the City on the malicious prosecution claim which is premised upon employees' actions which resulted in Plaintiff's arrest without probable cause, does not automatically establish sovereign immunity under §768.28. Quite simply, the city cannot have it both ways–they cannot insulate the individuals from liability under §768.28 because they did not act individually in bad faith or with malicious purpose, and at the same time insulate the City from liability because the individuals acted in bad faith or with malicious purpose. Accordingly, for clarification of both parties, this pendent state claim for malicious prosecution, unless replaced by Plaintiff's election to proceed under §1983, remains pending against the City of Key West which is not endowed with immunity through the beyond-the scope provision of Fla. Stat. §768.28.

The Defendant also seeks dismissal of Count III on the grounds that the limited waiver of sovereign immunity set

forth in §768.28 requires that "an action may not be instituted against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency." Fla. Stat. §768.28(6)(a). In Hattaway v. McMillan, 903 F.2d 1440 (11th cir. 1990), faced with a Plaintiff who failed to comply with Florida's notice requirement, this Circuit affirmed a district court's refusal to dismiss Plaintiff's claim on this ground. In so holding the court quoted with approval the holding in Fitzgerald v. McDaniel, 833 f.2d 1516 (11th Cir. 1987), wherein the court refused to dismiss a complaint for failure to strictly comply with the condition precedent notice requirements of Fla. Stat. §768.28(6) because

> ... it would serve no useful purpose to dismiss the complaint, for such a dismissal clearly must be without prejudice and with leave to amend. [footnote omitted.]... I note that if the defendants were able to articulate some actual prejudice that resulted from the Plaintiff's failure [to strictly comply with the notice requirement] before filing suit, I would be more inclined to dismiss the case and require the plaintiff to comply strictly with the language of Section 768.28.

Hattaway, 903 f.2d at 1446, quoting Fitzgerald, 833 F.2d at 1520 n.2 (quoting district court's order). In the present case, like in Hattaway and Fitzgerald, the court finds that it would serve no purpose to dismiss this action and to require refiling after written notice to the City is given. However, the Plaintiff is hereby notified that at the soonest possible time after receipt of this order and prior to trial, he shall give written notice to the City of Key West of this claim. During his case in chief, the Plaintiff shall further be required to present evidence that he complied with the notice requirement. The claim shall be deemed denied by the City at the time of the commencement of trial, unless settlement is effected. If the Plaintiff proceeds under the malicious prosecution theory and not under Section 1983, his failure to

establish that he satisfied the notice requirement as ordered by this court, will result in a dismissal of this claim with prejudice. See Hardcastle v. Mohr, 483 So. 2d 874 (Fla. Dist. Ct. App. 1986) (judgment against Plaintiff on the merits is required where Plaintiff chose to present his case at trial without having established the notice requirement). While this procedure is not a strict application of the notice requirement, it is fair to all parties. It simply cannot be said on this record that the City, who has participated in this litigation, including investigation and discovery of the claim, for two years without objecting to the lack of prior written notice until the eleventh hour, suffered any prejudice by Plaintiff's failure to give prior written notice of the claim.

Further, the court alternatively finds that the Defendant has waived the lack of notice defense because it failed to plead the notice requirement as an affirmative defense in its answer or in either of the two previous motions to dismiss. The court rejects the Defendant's belated technical objection for failure to give written notice because the city has litigated the case for two years without voicing this curable defect until just before trial. Notwithstanding this basis for waiver, the court will require the Plaintiff, for purpose of satisfying the spirit of the statute and preserving his claim, to establish notice on the more lenient terms set forth above.

In view of all of the foregoing, it is

ORDERED and ADJUDGED that Defendant's Motion to Strike, Dismiss and for Summary Judgment (DE 39-1, DE 39-2, DE 39-3) is GRANTED in part and DENIED in part. The claim for attorney's fees is STRICKEN, the Motion is DENIED in all other respects. Trial of this case shall proceed as scheduled against the City on Count II (§1983 Deprivation of Property Without Due Process) and Count III (Malicious Prosecution or §1983 (Warrantless Seizure Without Probable Cause). No further pre-trial motions will be heard.

DONE and ORDERED at West Palm Beach, Florida, this 14th day of May 1996.

S:/_____

JAMES C. PAINE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16404-DD

ARNAUD GIRARD,
NAJA BISSAR,
Plaintiffs-Appellants,
versus
CITY OF KEY WEST,
MARC SUMMERS, ET AL.,
Defendants-Appellees.

Filed
U.S. Court of Appeals
Eleventh Circuit
JUL 15 2003
Thomas K. Khan
Clerk

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: EDMONDSON, Chief Judge, WILSON and GODBOLD, Circuit Judges.

BY THE COURT:

Appellants Girard and Bissar ("Girards") filed a 42 U.S.C. § 1983 action against the Defendants, the City of Key West and several City employees in their official capacities. The Defendants moved for summary judgment. The district court found that each of the acts challenged by the Girards was subject to meaningful administrative review and represented neither officially policy nor actionable custom. The court held that there was no municipal liability under § 1983 and granted the defendants' motion. The Girards appealed. We affirmed. The Girards filed a motion for rehearing.

We directed the parties to brief the specific issue of whether Bight Managment is the final policymaker regarding the availability of dock space to non-tenants under the 1994 Key West, Florida City Ordinance. The parties have briefed the issue.

We have examined the 1994 ordinance. Pursuant to its provisions the City Manager supervises Bight Management's decisions, therefore Bight Management is not the final policymaker regarding availability of dock space to non-tenants.

Appellants' motion for rehearing is DENIED.

U. S. COURT OF APPEALS for the 11th Circuit
GIRARD V. THE CITY OF KEY WEST
No. 00-16404
October 25, 200

Arnaud GIRARD,
Naja BISSAR,

Plaintiffs-Appellants,

versus
CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR,
EDWARD SCHERBIN, a.k.a. Edward Scherdin,
DONNA WAGNON,
ROBERT WINTERBOTTOM.

Defendants-Appellees.

Filed
October 25 2001
Thomas K. Khan
Clerk

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Issued as Mandate
July 23, 2003
Clerk
U.S. Court of Appeals
Atlanta, GA

Entered: October 25, 2001
For the Court: Thomas K. Kahn,

By: McCombs, Elaine

APPENDIX G

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

APPENDIX H

ORDINANCE NO. 93-24

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF KEY WEST CREATING CHAPTER 24.00 OF THE KEY WEST CODE OF ORDINANCE; ADOPTING A CHARTER FOR THE ESTABLISHMENT OF THE KEY WEST BIGHT MANAGEMENT DISTRICT; PROVIDING FOR EXISTENCE, ESTABLISHING DUTIES, POWERS AND AUTHORITY; PROVIDING FOR MEMBERSHIP AND TERMS; PROVIDING FOR APPEALS; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, by Resolution No. 92-400 the City Commission of the City of Key West adopted the recommendations of the Trust for Public Land Advisory Council concerning the management, preservation and redevelopment of the City's property at Key West bight; and

WHEREAS, by Resolution No. 92-400 the City Commission specifically adopted the four concepts below as guiding principles in the ownership and operation of the City's property at Key West Bight:

1. Commitment to Private Management
2. No city Involvement in Setting Rents
3. No Use or Pledge of Property Taxes
4. Oversight by an Independent Board; and

WHEREAS, the City Commission of the City of Key West charges the Key West Bight Management District Board to carry out the intentions of Resolution 92-400 insofar as those recommendations are consistent with federal laws, state law, the City Charter and Code and the covenants of the Key West Marina/conservation bond; and

WHEREAS, the ownership and leasing of the commercial property and the management of the public marina and fuel dock at Key West Bight must be consistent with federal law, state law, the City of Key West Charter, Code of Ordinance and the Marina/Conservation bond covenants; and

WHEREAS, the City Commission can best provide for sound business practices in the management and operation of the City Marina and upland leases by providing for oversight by an non-elected oversight board; and

WHEREAS, the City of Key West by virtue of Chapters 166, and 189 of the Florida Statutes has the power and authority to create a dependent district for Key West Bight and appoint an oversight board for the management of the Key West Bight; and

WHEREAS, the creation of a Key West Bight Management District will serve a public purpose by vesting authority in the appointed members of the Management District to oversee the manager of the Key West Bight in the performance of day to day duties as well as the implementation of long term plans; and

WHEREAS, the proper management, preservation and redevelopment of the City's property at Key West Bight will benefit the tenants of the Bight and all of the citizens of Key West, and provide further for the general health safety and welfare of the community;

NOW THEREFORE, BE IT ENACTED by the City Commission of the City of Key West, Florida as follows that the following Chapter 24.000 of the Key West Code of Ordinances is hereby created and the Charter for the Key West Bight Management District is hereby adopted as follows:

Section 1. Chapter 24.00 Code of Ordinances, City of Key West, Florida is hereby created to read as follows:

24.00 KEY WEST BIGHT MANAGEMENT DISTRICT; BOARD

24.01 Definitions

As used in Sections 24.01 through 24.10 inclusive the following words shall have the meaning ascribed thereto:

Accounting - a certified public accountant

Banking- an executive officer of a banking institution

Board - the appointed members of the seven member Key West Bight Management District

Chamber of Commerce - a member of the chamber of Commerce endorsed by its board.

Commission - the elected seven member City Commission for Key West.

Historic Preservation - a board member, or a past board member or current <u>or former</u> Executive director of any group or organization whose purpose is primarily to study, preserve, protect or encourage historic preservation in Key West.

Legal - a person having graduated from an accredited law school in good standing with the Florida Bar or Bar of another State.

Manager - any person(s) whether natural or corporate who has the following contractual duty which includes, but is not limited to management of the City owned Key West Bight real property, including the marina, to prepare an annual budget and business plan, to negotiate lease terms first with existing tenants and set market rental amounts, (subject to Board approval) to collect rental payments and remit same to city, and the development of rules and regulations for the marina and uplands, and any other duties or responsibilities assumed by the manager by contractual agreement.

Maritime - a person ~~involved in~~ with professional maritime experience ~~activity.~~

Real estate - a person with experience in property management engaged as a licensed real estate broker, or state licensed real estate appraiser.

Supermajority - a vote equal to a simple majority vote ;plus one vote, regardless of the number of Commission members present and voting.

Tenant - any person(s) whether corporate or natural having the legal right to occupy the City property at Key West Bight regardless of status as a tenant or subtenant of the property as of May 24, 1993.

Sec. 24.02 Findings; purpose; Board created.

(a) The City Commission hereby finds that the management, preservation, and redevelopment of the Key West Bight property owned by the City of Key West is a public purpose, and further finds that said public purpose can be best achieved by creating the Key West Bight Management District Board having the power and duty to oversee the management preservation and development of the City's property at Key West Bight for best interest of the City and its citizens.

(b) The City Commission hereby creates the Key West Bight Management District Board (hereinafter Board or KWBMDB), and charges the Board to use the power and authority conferred upon it by the Code of Ordinances to further the purposes expressed herein. The KWBMDB shall consist of a seven member board appointed by the Mayor with consent of the City Commission.

Sec. 24.03 Powers and duties.

The KWBMDB shall have the following duties and

(a)(1) prescribe the duties and responsibilities of the manager,

(2) to hire future manager(s) and negotiate management contracts subject to approval by the City Commission.

(3) to terminate manager(s) manager(s) according to the terms of any contract.

(4) oversee the operation and development of an expanded public marina on the Key West Bight property

(5) supervise the manager in the performance of those duties contracted for by the manager,

(6) facilitate and approve application for all required permits necessary for redevelopment and or expansion of the uplands property and marina.

(7) make application to the Trustees of the Internal Improvement Trust Fund for renewal of all baybottom lease rights and apply for those deemed necessary to carry out marina expansion plans.

(8) identify and recommend grant applications for approval by the City Commission,

(9) review and approve the annual budget and business plan prepared by the Manager prior to submission for approval or disapproval by the City commission (without line item veto),

(10) approve rental rates and lease terms negotiated by the Manager for marina and upland tenants at Key West Bight. All leases shall be consistent with the City

Charter, Code of Ordinances and Marina Bond Covenants.

(11) The Board shall review all conflicts between the manager and tenants. All decisions of the Key West Bight Management district Board regarding day to day operation of the Key West Bight marina, the terms and management of rental property and administration of leases shall be final.

(12) All matters within the Key West Bight subject to review and/or approval by the Community Redevelopment Agency shall be considered by the Board for review and comment only.

(b) On the following matters the Key West Management District Board shall submit ordinances and resolutions to the city commission which shall retain final approval authority on those ordinances and resolutions coming before it;

(1) the Key West Bight Management district budget and annual business plan.

(2) architectural concept, design or plans of redevelopment at Key West Bight,

(3) acquisition and/or sale of real property at Key West Bight

(4) the expenditure of funds in excess of $7,500
(5) transfers of funds from one budget category to another.
(6) The City Commission shall request voter approval on matters of pledging commercial rents and marina revenues for the financing of improvements, expansion or property acquisition at or around the Key West Bight.
(7) The City Commission shall have final review over any matter which may affect the tax exempt status of the marina/conservation bond.

Sec. 24.04 Composition and terms; compensation
The KWBMDB Board shall consist of seven members who shall reside in Key West or have a business or profession located in Key West, and reside in the lower keys (south of the seven mile bridge) who shall be appointed by vote of the city Commission. No voting board member shall have any ownership interest in any business located in the KWBMD or shall be employed by a tenant or ownership interest located in the KWBMD.

The Mayor shall present a slate of nominees to the Commission with not less than 2 nor more than 3 nominees for each discipline to be represented. The nominee from each discipline receiving the highest number of votes shall be appointed. At least one person

with a demonstrated interest in community service from each of the following disciplines shall be represented on the KWBMDB: legal; accounting; banking; historic preservation ; maritime; real estate, Chamber of Commerce.

Appointments shall be made on a staggered basis as follows. Of the initial appointments, three (3) members shall be appointed for a term of two (2) years, and four members shall be appointed for a term of four years. Thereafter, each appointment shall be for a term of four years, except that appointments to replace a vacating member shall be for the unexpired term of said member.

Any member may be removed by the City Commission for cause, which shall include but not be limited to violation of law relating to the member's office. All members shall serve without compensation but, as authorized by the City Commission, may be reimbursed for actual expenses incurred in connection with their duties.

~~Two tenants of the Key West Bight shall sit on the Board as nonvoting members. Nominees shall be submitted at large to the mayor who shall submit six names to the Commission. The nominees receiving the highest and second highest vote shall be appointed to serve terms of two (2) years.~~

The Key West Bight Preservation Association shall appoint two of its members to serve as liaison with the KWBMDB; liaison shall not

The City Commission shall appoint one of its own members to serve as liaison with the KWBMDB; the liaison shall not be a voting member of KWBMDB.

Sec. 24.05 Staff.

The City Manager shall assure that sufficient secretarial support staff is provided to the Board for the execution of its duties, and in order to record and transcribe in summary form, subject to KWBMDB approval, the minutes of all KWBMDB meetings. The city attorney or designee thereof may serve as legal counsel to the KWBMDB.

Sec. 24.06 Organization and rules.

(a) Four members of the KWBMDB shall constitute a quorum for the transaction of business.

(b) From among its members KWBMDB biannually shall elect a chairperson and such other officers as it deems necessary.

©) KWBMDB shall attempt to convene on a regularly scheduled basis at least once each month, and notice of such meeting shall be published in a newspaper of general circulation in the city at least five days in advance thereof. All meetings shall be open to the p0ublic and an agenda for each regular meeting shall be available to the public at City Hall forty-eight hours in advance thereof.

(d) Special meetings may be called on not less than 24 hours notice by the chairperson or by written notice signed by four voting members. ~~No official act on shall be taken during any special meeting unless four members concur~~.

(e) Minutes shall be kept of all meetings of the KWBMDB and committees thereof.
(f) If a member is absent from two of three consecutive meetings without cause and without prior approval of the chairperson, the KWBMDB may declare the member's office vacant.

24.07 Revenues and budgeting thereof
(a) Not less than ninety (90) days prior to the end of each fiscal year of the KWBMD, which shall be the same fiscal year as that of the city, the board shall adopt by resolution its proposed budget for the following fiscal year, and submit the same to the City Commission. Such proposed budget shall include all anticipated expenditures of the district for all of its projects during the ensuing fiscal year, including operating expenses, capital outlays, materials, labor, equipment, supplies, payments of principal and interest on all outstanding revenue bonds, and sinking fund and reserve requirements, and payment of excess funds into the City's General Revenue Fund. Such proposed budget shall provide for expenditures only to the extent of funds legally/available to the district for such purposes and reasonably anticipated revenues of the district for the ensuing fiscal year from established sources, based upon past experience and reasonable projections thereof, and from new projects or new sources of income of the district. The City Commission shall, conduct a public hearing with respect thereto, and in that event, the chairman or his/her designee and manager of the district shall be present at such public hearing.

each project under its control during the preceding fiscal year, including all matters relating to rates, charges, revenues, expenses of maintenance, repair and operation and of replacements and extensions, principal and interest retirement and the status of all funds. Copies of such annual reports shall be filed with the City Clerk..

24.08 Changes and Amendments
Any change, amendment or repeal of this Ordinance may be affected only by a supermajority vote of the City Commission.

24.09 Key West Bight management district: Sunset
The Key West Bight management District and the Board created herein shall not be disbanded or repealed prior to the retirement or defeasance [of the]1992 Key West Bight Marina Conservation Bond.

24.10 Conflict
Nothing herein shall be construed to be in conflict with the City of Key West Charter, Code or Marina Bond covenants.

Section 2. All Ordinances or parts of Ordinances of said City in conflict with the provisions of this Ordinance are hereby superseded to the extent of such conflict.

Section 3. If any section, provision, clause, phrase, or application of this ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this ordinance shall be deemed severable therefrom and shall be construed as

reasonable and necessary to achieve the lawful purposes of this ordinance.

Section 4. This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signatures of the presiding officer and the Clerk of the Commission.

Read and passed on first reading at a regular meeting held this 24 day of May, 1993.

Read and passed on final reading at a regular meeting held this 3rd day of June, 1993.

S:/
DENNIS J. WARDLOW
MAYOR

ATTEST:
S:/
JOSEPHINE PARKER, CITY CLERK

ORDINANCE NO. 96-3

AN ORDINANCE OF THE CITY OF KEY WEST, FLORIDA, AMENDING CHAPTER 24 ENTITLED "KEY WEST BIGHT MANAGEMENT DISTRICT BOARD" BY AMENDING SECTION 24.03 TO ESTABLISH DAY-TO-DAY MANAGEMENT DUTIES OF THE BIGHT AS A CITY MANAGER RESPONSIBILITY; AMENDING SECTION 24.04 TO ALTER THE QUALIFICATIONS OF BOARD MEMBERS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the Key West Bight Management District Board ("KWBMDB") at its meeting of February 21, 1996, recommended ordinance amendments regarding the operation of the Key West bight; and

WHEREAS, the City Manager recommends such ordinance amendments; and

WHEREAS, the City Commission finds that such ordinance amendments will serve the best interest of the citizens of Key West;

APPENDIX J

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF KEY WEST, FLORIDA:

Section 1: That Section 24.03 of the Code of Ordinances is hereby amended as follows:

Section 24.03 Powers and duties of Board; responsibility of City

The KWBMDB shall have the following duties:

(a) ~~(1) Prescribe the duties and responsibilities of the manager;~~

~~(2) To hire future manager(s) and negotiate management contracts subject to approval by the City Commission;~~

~~(3) To terminate manager(s) according to the terms of any contract;~~

~~(4)~~(1) Oversee the operation and development of an expanded public marina on the Key West Bight property;

~~(5) Supervise the manager in performance of those duties contracted for by the manager;~~

~~(6)~~(2) Facilitate and approve application for all required permits necessary for redevelopment and/or expansion of the uplands property and marina;

~~(7)~~(3) Make application to the trustees of the internal improvement trust fund for renewal of all baybottom lease rights and apply for those deemed necessary to carry out marina expansion plans;

~~(8)~~(4) Identify and recommend grant applications for approval by the city commission;

*(Coding: Added language is underlined; deleted language is ~~struck through~~.)

~~(9)~~(5) Review and approve the annual budget and business plan prepared by the manager prior to submission for approval or disapproval by the city commission (without line item veto);

~~(10)~~(6) Approve rental rates and lease terms negotiated by the manager for marina and upland tenants at Key West Bight; all leases shall be consistent with the City Charter, Code of Ordinances and the Marina Bond Covenants;

~~(11)~~(7) ~~The board shall r~~Review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding ~~day to day operation of the Key West Bight Marina~~, the terms and management of the rental property and administration of leases shall be final;

~~(12)~~(8) All matters within the Key West Bight subject to review and/or approval by the community redevelopment agency shall be considered by the board for review and comment only.

c. The City by and through its city manager shall have day-to-day responsibility for the operation of the Key West Bight. The Bight Manager shall be an employee of the City, subject to hiring, supervision and termination by the city manager. Additionally, the city manager shall prescribe the duties of the Bight Manager upon the advice and consent of the KWBMDB.

Section 2: That Section 24.04 of the Code of Ordinances is hereby amended as follows:

Sec. 24.04 Composition and terms; compensation.

The KWBMDB board shall consist of seven (7) members who shall reside in Key West, or have a business or profession located in Key West, and reside in the lower keys (south of the seven-mile bridge), and shall be appointed by

vote of the city commission. No voting member shall have any ownership interest in any business located in the KWBMD or shall be employed by a tenant or ownership interest located in the KWBMD.
The Mayor shall present a slate of nominees to the commission with not less that two (2) nor more than (3) nominees for each discipline to be represented. The nominee from each discipline receiving the highest number of votes shall be appointed. At least one (1) person with demonstrated interest in community service from each of the following disciplines shall be represented on the KWBMDB: legal; accounting; banking; historic preservation; maritime; real estate; Chamber of Commerce. In the event no applicant is reasonably available to represent a discipline, the Mayor may nominate a person from outside of the discipline.

Section 3: If any section, provision, clause phrase, or application of this Ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this Ordinance shall be deemed severable therefrom and shall be construed as reasonable and necessary to achieve the lawful purposes of this Ordinance.

Section 4: All Ordinances or parts of Ordinances of said city in conflict with the provisions fo this Ordinance are hereby superseded to the extent of such conflict.

Section 5: This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

Read and passed on first reading at a regular meeting held this ___3rd___ day of March, 1996.

Read and passed on final reading at a regular meeting held this ___19th___ day of March, 1996.

Authenticated by the presiding officer and Clerk of the Commission on ___22nd___ day of March, 1996.

Filed with the Clerk March 22, 1996.

S:/ _____
Dennis J. Wardlow, Mayor

Attest: S:/ _____
Josephine Parker, City Clerk

ARTICLE IV. EXECUTIVE AND ADMINISTRATIVE

4.01 City Manager.

There shall be a city manager who shall be the chief executive and the administrative officer of the city. The manager shall be responsible to the commission for the administration of all city functions and affairs placed in his charge by or under this Charter.

4.02 Appointment of manager.

The commission shall appoint a city manager for an indefinite term by a majority vote of all the commissioners to serve at the pleasure of the commission.

4.03 Designation of administrative officer during temporary absence of manager.

By letter filed with the clerk, the manager shall designate, subject to approval of the commission, a qualified city administrative officer to exercise the powers and perform the duties of manager during his temporary absence or disability. During such absence or disability, the commission may revoke such designation at any time and appoint another officer of the city to serve until the manager shall return or his disability shall cease.

4.04 Duties of city manager.

The city manager shall:

(a) Appoint, and when he deems it necessary for the good of the city, suspend or remove all city employees and appointive administrative officers provided for by or under this Charter, except as otherwise provided by law, this Charter, civil service board rules and regulations or personnel rules adopted pursuant to this Charter. He may authorize any administrative officer who is subject to his direction and supervision to exercise these powers with respect to subordinates in that officer's department, office[r], or agency;

(b) Direct and supervise the administration of all departments, offices and agencies of the city, except as otherwise provided by this Charter or by law;

©) Attend all commission meetings and shall have the right to take part in discussion but may not vote;

(d) See that all laws, provisions of this Charter and acts of the commission, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed.

4.05 Department of city.

All functions of municipal government shall be allotted among various departments including, but not limited to, a finance department, a department of general services, a police department and a fire department. Police and fire departments shall be headed by a police chief and a fire chief whose chiefs shall have exclusive control of the stationing and transfer of all officers and employees of the department as may be prescribed by the ordinances of the city. Department heads shall be considered employees of the city and covered by the civil service system.

4.06 City attorney.

There shall be a city attorney who shall be the legal advisor to, and attorney and counselor for, the municipality and all of its officers, boards, commissions, agencies, authorities and subdivisions except as otherwise expressly provided by general or special law. The city attorney shall be appointed by, and shall serve at the pleasure of, the city commission. The city attorney may appoint an assistant or assistants, subject to confirmation by the city commission, who shall serve at the pleasure of the city attorney.

...

Respectfully submitted,

Arnaud Girard
P.O. Box 6263
Key West, FL 33041
(305) 731-4723
(305) 731-7299